SUPREME COURT, U. S.

SEP 22 1970

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 738

EULA CRAIG, ELLIOTT H. CRAIG and
WOODROW PARNELL,
Petitioners,

vs.

OLIN MATHIESON CHEMICAL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

WILLIAM W. SCHOOLEY
2038 Edison Avenue
Granite City, Illinois 62040
Attorney for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Eula Craig, Elliott H. Craig and Woodrow Parnell respectfully petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit which was rendered on June 24, 1970.

OPINIONS BELOW

The District Court entered judgments on jury verdicts in favor of plaintiffs. The United States Court of Appeals for the Seventh Circuit reversed in an opinion not yet reported, a copy of which may be found as an appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was rendered on June 24, 1970. No petition for rehearing was filed. The jurisdiction of this Court is invoked under the Act of June 25, 1948, Chapter 646, 62 Stat. 929, 28 U. S. C. A. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether, as required by the decision in Erie Railroad v. Tompkins, the United States Court of Appeals for the Seventh Circuit applied the applicable state standard for determining when a verdict should be directed as established by the Illinois Supreme Court, in reversing the judgments entered on jury verdicts for plaintiffs, holding that defendant was not negligent and plaintiffs were contributorily negligent as a matter of law.

2. Whether, assuming the United States Court of Appeals applied the proper state standard for directing a verdict, that Court improperly applied that standard to the facts of this case holding that defendant was not negligent and plaintiffs were contributorily negligent as a matter of law.

STATEMENT OF THE CASE

In the early 1960's the defendant, Olin Mathieson Chemical Corporation began a renovation program which consisted of building a new casting plant and renovating the existing plant facilities in East Alton, Madison County, Illinois (T. 413, 414, 415). As part of this program, Olin entered into a contract (P. Ex. 5) on June 14, 1963 with the third party defendant, Eichleay-Wolfe, joint venturers, to perform certain remodeling at the existing Olin Tandem Mill in East Alton, Illinois. Prior to the remodeling Olin utilized the tandem mill to roll and squeeze cast bars of hot brass between wringers to make them into long thin sheets (T. 322-323). The brass was conveyed back and forth between the wringers on rollers or conveyors (T. 327). In the operation of the process Olin used large amounts of grease and oil to lubricate the conveyors and wringers and to cool the brass (T. 338). The grease and oil would drip to the floor or into pans and over the years the machinery became heavily coated (T. 340). Periodically Olin would clean the oil and grease from the area (T. 48).

The contract entered into by Eichleay-Wolfe called for the removal of the conveyors in the tandem mill (T. 416). The contract permitted Olin to produce brass rolls while certain other offsite work was performed by the contractor (T. 90). Eichleay-Wolfe started work to remove the roller conveyors on the day the plaintiffs, Elliott Craig and Woodrow Parnell were injured, September 7, 1963 (T. 90-91). Until September 7, 1963 Olin continued to roll brass (T. 333). Under the contract Olin allowed the contractor 29 days to complete the job, working 24 hours per day under a sophisticated work schedule called a "critical path schedule" (T. 346, 347). The critical path schedule was Olin's method of controlling progress (T. 350).

Prior to entering the contract, Glenn Wolfe, owner of the M. H. Wolfe Construction Company, and project engineer for the joint venture (T. 88), inspected the conveyor area with Lino Marcon, project manager for Olin (T. 321), and noted the grease and oil on the conveyors. To remove the conveyors and steel Eichleay-Wolfe utilized oxygen-acetylene torches operated by members of the ironworkers' trade. The contractor used an overhead Olin crane to remove the dismantled material (T. 92).

The plaintiff, Elliott H. Craig, on September 7, 1963, was a 35-year-old construction ironworker, married to the plaintiff, Eula Craig (T. 100). Elliott Craig had been an ironworker since 1949 (T. 101). Among his duties of a construction ironworker were erecting structural steel, installing re-enforcing steel in concrete, welding and burning metal and moving machinery (T. 101). Craig had been using oxygen and acetylene welding equipment for welding and burning since he started as an ironworker in 1949 (T. 101). He was instructed in the use of oxygen acetylene torches while serving a two year apprenticeship (T. 137). Both Craig and Parnell were aware of the importance of keeping the connections of the torch free from dirt and oil (T. 144, 145, 177) but were not aware that the fittings would explode if coated with grease (T. 149).

Craig started to work as an ironworker and ironworker steward for the Eichleay Company approximately 18 months prior to September 7, 1963 working in the New Brass Mill at East Alton, Illinois (T. 103). Approximately two weeks prior to September 7, 1963, Craig knew he was going to work removing the conveyors in the Old Brass Mill. He made an inspection of the area with Lino Marcon, construction superintendent, and asked that the dirt and grease be cleaned from the area (T. 105), but it was never cleaned (T. 106). The oil and grease

was so thick it was difficult to walk and was all over the machinery (T. 106). It was thicker than any other job that Craig had been on (T. 109).

On September 7, 1963, the plaintiff, Elliott Craig, was assigned to burning out anchor bolts and conveyors with a fellow ironworker, the plaintiff, Woodrow Parnell, by means of an oxygen and acetylene torch.

The plaintiffs accomplished the burning by means of an oxygen tank and an acetylene tank mounted on a two wheel dolly cart (T. 112). On top of each tank was a gauge with both a high pressure and a low pressure valve (T. 113). When cutting the bolts a fire would start and a fireman from Olin would put out the fire (T. 107). After working for an hour or so the plaintiffs' clothes and gloves became saturated with oil and grease (T. 108).

Pieces of the conveyor and machinery were cut with the torch and hauled away by crane. Two overhead cranes were going back and forth over the area in which the ironworkers were working. The cables of the crane and the chokers used to haul pieecs away were saturated with oil and grease which dripped in the area the plaintiffs were working (T. 176).

Craig and Parnell started to work at 8:00 a. m., September 7, 1963 and went to supper at 5:00 P. M. During this period there was no difficulty with the tanks or gauges (T. 120). Shortly after dinner they ran out of oxygen (T. 121). The gauges were taken off the oxygen tank by Craig and placed on a tray on the cart (T. 122). They went to a storage area approximately 50 feet away, deposited the old tank, and picked up a new tank (T. 123). When they returned to their work area they rehooked the gauges and hoses to the tank (T. 124). Craig did not see any grease on the fittings before they were rehooked (T. 151). Parnell then opened the high pressure

valve to let air to the gauge. The gauge instantaneously exploded causing burns to Craig (T. 170, 126). The explosion and fire appeared to be coming from the diaphram part of the low pressure gauge (T. 125). Plaintiff's Exhibits 16, 17 and 18 are pictures of the valve and gauges taken by Olin personnel several days after the explosion (T. 192). During the time Craig worked on September 7, 1963, he did not receive any directions from Olin personnel (T. 155). Olin's Exhibits 1 through 4 represent photographs of the area in which the ironworkers were working, taken within a week of the accident (T. 330).

Professor Gerald Driefke testified on behalf of the plaintiffs as an expert witness. Professor Driefke did research and performed experiments on the subject of combining oxygen under pressure with grease and oil (T. 235). The professor prepared an experiment wherein a drop of oil was combined with oxygen under high pressure resulting in a controlled explosion in the courtroom (T. 236-245). The Professor testified that the experiment was analogous to grease inside a fitting on the oxygen tank used by the plaintiffs but that the oxygen must be inside the fitting and not on the outside (T. 241). At the conclusion of a hypothetical question, assuming facts in evidence (T. 247-251), his opinion was that the opening of the high pressure oxygen valve caused high pressure oxygen to come into contact with a combustible material such as oil or grease in the area between the tank and the low pressure valve, resulting in a fire and explosion similar to the one described by the plaintiff Craig (T. 252-253).

Lino Marcon, who was construction superintendent for Olin, testified that the area in which the contractor was to work was marked off (T. 332) and turned over to the contractor (T. 333). He further testified he was permitted to make inspections of the area but did not give instructions to the hourly people (T. 334). He denied having any

discussions with Craig (T. 336), but stated he had authority to give orders to Glenn Wolfe in a limited way (T. 344), and to take necessary steps to keep the job on the critical path schedule (T. 346). There was no time on the critical path schedule to clean up the grease (T. 357). Olin was interested in two things, getting a good job and the duration of the job (R. 352).

Gordon Rhine, safety department manager for Olin (T. 44), testified that Olin was a member of the National Safety Council, which is an organization established to help people in industry prevent accidents (T. 46). He further testified that he was acquainted with a publication of the National Safety Council, entitled "American Standard Safety Code for Building Construction" (P. Ex. 2), and that it was a part of the Olin library (T. 64). The publication contained Rule 4.21 which reads as follows (T. 66, 298):

> "Oxygen cylinders and fittings should be kept away from oil or grease. Oil or grease in the presence of oxygen under pressure may ignite violently. Employees should be prohibited from handling oxygen cylinders or apparatus with oily hands or gloves . . ."

Mr. Rhine was familiar with the rule and subscribed to the safety principle espoused in the rule (T. 66, 298).

Mr. Rhine was familiar with the fact that the area was greasy and dirty when the outside contractors went to work in the area (T. 50) and assumed that they would be using oxygen and acetylene welding equipment (T. 50).

Olin had promulgated a set of rules (Pl. Ex. 1) to be followed by outside contractors (T. 52) among which was the following (T. 56):

> "8. Storage, handling and usage of oxygen and acetylene tanks shall be in accordance with recognized

safety practices. Tanks, empty or full, must be secured to prevent them from being knocked over."

Mr. Rhine also testified that the Olin project engineer in general charge of the entire operation would probably be concerned with the safety practices followed by outside contractors (T. 301, 302).

The general conditions of the contract between Olin and Eichleay-Wolfe contained the following paragraphs (T. 305-311):

"14.5. The contractor shall at all times enforce discipline and good order among its employees, and shall not employ on the work any unfit person or anyone not skilled in the work assigned to him. The engineer or owner may require contractor to remove from this work such employees as either of them deem incompetent, careless and insubordinate."

"17.1. Owner and its representatives shall at all times have access to the work wherever it is in preparation or progress and the contractor shall provide proper facilities for such access and for inspection."

"32.1. Owner reserves the right to let other contracts or to utilize owner's personnel in connection with the work or in connection with the over-all project. Contractor shall afford others reasonable opportunity for the introduction and storage of their materials and the execution of their work, and shall properly connect and coordinate its work with theirs."

"34.1. If Owner names an engineer hereunder, such engineer shall have general supervision and direction of the work. He is the agent of owner only to the extent provided in the contract documents and when in special instances he is authorized by the owner so to act, and in such instances he shall, upon request,

> show contractor written authority. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the work. Engineer shall, within a reasonable time, make all decision required hereunder on any claims of contractor and on all materials pertaining to the work."

Paragraph (4), Page 3, Plaintiff's Exhibit No. 4, which is the contract between Olin and Eichleay-Wolfe provides (T. 309):

> "Contractor understands and agrees that it is extremely important to owner that the project be completed by the specified dates. Failure of contractor to complete the project on the date specified will delay progress in owner's program to resume production operations with attendant loss of profit to owner.
>
> Contractor, prior to the execution of this contract, has carefully examined owner's critical path schedule, arrow diagram, craft leveling charts, time scale diagram, and scheduled rate of progress charts pertaining to the project, and agrees to comply strictly with the provisions of the contract pertaining to the critical path schedule, arrow diagram, craft leveling charts, time scale diagram, and scheduled rate of work, and any other related provisions contained in the contract. Owner will make daily checks to insure compliance with the project * * * schedule."

Craig and Parnell instituted a suit against Olin alleging that their injuries were sustained as a result of Olin's negligence. Jurisdiction of the United States Court for the Southern District of Illinois was based solely on diversity of citizenship and the amount in controversy. Eula Craig, wife of Elliott, joined in this action against Olin claiming damages for the loss of services as a result.

Olin answered denying the allegations of negligence and alleging affirmatively that Craig and Parnell were contributorily negligent as a matter of law. Olin brought a third party indemnity action against the contractor, employers of Craig and Parnell, based on both the terms of the contract and the common law. The cases were consolidated and tried before a jury which returned verdicts against Olin in favor of Elliott Craig in the amount of Twelve Thousand Dollars ($12,000.00), in favor of Woodrow Parnell in the amount of Fifteen Hundred Dollars ($1500.00) and in favor of Eula Craig in the amount of No Dollars and No Cents ($0.00). The District Court denied appropriate motions for directed verdicts and for judgment notwithstanding the verdicts. From this judgment the Craigs appealed on the ground that the damages awarded were so inadequate as to be clearly erroneous and sought a remand for retrial on the issue of damages only. Olin appealed contending that the evidence of negligence on its part was insufficient as a matter of law and that the plaintiffs Parnell and Craig were contributorily negligent as a matter of law. The United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court holding that defendant was not negligent and plaintiffs were contributorily negligent as a matter of law and that the District Court had erred in denying defendant's motions for directed verdict and judgment n. o. v.

ARGUMENT

In a Case Based Solely on Diversity of Citizenship a Federal Court Sitting in Illinois May Hold That a Party Is Negligent or Contributorily Negligent as a Matter of Law Only in Those Cases in Which All of the Evidence When Viewed in Its Aspect Most Favorable to the Opponent So Overwhelmingly Favors Movant That No Contrary Verdict Based on the Evidence Could Ever Stand.

Erie R. R. v. Tompkins, 304 U. S. 64, requires that in a case based solely on diversity of citizenship a Federal Court must apply the substantive law of the state in which it sits. Although the Supreme Court has left open the question of whether in such a case a state or federal standard should determine the sufficiency of the evidence to support a jury verdict, Mercer v. Theriot, 307 U. S. 152; Dick v. New York Life Insurance Co., 359 U. S. 437, and although a federal standard has been advocated (See 5 Moore Federal Practice, p. 318.10, Second Edition, 1951), decisions subsequent to **Erie** indicate that the standard for sufficiency of the evidence should be considered a substantive and therefore the state's standard should be applicable. Hanna v. Plumer, 380 U. S. 460; Byrd v. Blue Ridge Rural Electric Co-operative, Inc., 356 U. S. 525; Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U. S. 487.

The Supreme Court of Illinois established the rule in **Pedrick v. Peoria and Eastern Railroad Co., 37 Ill. 2d 494; 229 N. E. 2d 504 (1967),** that:

> "Verdicts ought to be directed and judgment n. o. v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no

contrary verdict based on that evidence could ever stand." 37 Ill. 2d at 510, 229 N. E. 2d at 513.

In the same decision the Court stated that:

"Logic demands that one rule govern both the direction of verdicts and determination of the presence or absence of negligence or contributory negligence as a matter of law, for in both situations the issue is whether a Court or the jury should decide the negligence issue." 37 Ill. 2d at 503, 229 N. E. 2d at 510.

A

Applying this standard to the present case it is clear that the United States Court of Appeals for the Seventh Circuit erred in holding that the defendant was not negligent as a matter of law and that the District Court erred in denying defendant's motions for a directed verdict and for judgment n. o. v.

The very language of the opinion of the Court of Appeals demonstrates a patent violation of the standard established in the Pedrick case. On page 11 in the appendix of this petitioner, the Court states:

"While the question is not free from doubt, we think the proof was insufficient to establish the charge of negligence against Olin."

The policy of the rule established in **Pedrick** is that directed verdicts should be entered sparingly and only in those cases where the proof is so overwhelming that a contrary verdict could never stand. If, as the Court has stated, the question of defendant's negligence is not free from doubt and it clearly has admitted failure to comply with the **Pedrick** standard.

Defendant Olin's negligence is the result of the breach of its duty to furnish the employees of the contractor with

a safe place to work. In Calvert v. Springfield Electric Light and Power Company, 231 Ill. 290, 293; 83 N. E. 2d 184, 186, the Court stated:

> "The law is well settled that an owner or occupant of land who by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist without timely notice to the public or to those who are likely to act upon such invitation, and if there are hidden dangers upon the premises he must use ordinary care to give persons rightfully upon the premises warning thereof, and that the owner owes such duty to an independent contractor or his servants while working upon his premises."

See also National Builders Bank v. Schuham, 319 Ill. App. 546; Haugh v. Ryerson, 171 Ill. App. 414. The plaintiffs' evidence clearly presented a jury question on the issue of defendant Olin's failure to provide Craig and Parnell a safe place to work. Over the years Olin had used large amounts of grease and oil as lubrication and the area had become heavily coated with grease and dirt. A method of cleaning was available to Olin because they had cleaned in the past. Personnel from Olin were aware that the area was greasy and dirty. The safety department manager for Olin was acquainted with the dangerous propensities of a mixture of oxygen under pressure and grease and oil. He espoused a safety rule that oxygen cylinders and fittings should be kept away from grease and oil. Prior to commencement of the project plaintiff Craig made a request to a member of the Olin staff that the area be cleaned, but there was a tight work schedule prepared by Olin which did not provide for cleaning. When fires did start from the torches, Olin's personnel were available to extinguish

the fires. Notwithstanding its contract with the contractor Eichleay-Wolfe, Olin had sufficient control over the premises and the project under the contract to require cleaning of the area prior to commencing the job. While Craig and Parnell knew that fires were probable while they were cutting grease covered anchor bolts, neither were aware of the danger of an explosion if grease or oil came into contact with oxygen under pressure.

Under these circumstances it was clearly a question for the jury to determine whether Olin was aware of the risk involved and whether being aware of that risk it failed to require that the grease and oil be removed by steam cleaning or some other method prior to commencing the project.

The gauges exploded immediately upon the turning on of the oxygen valve into the gauge. The gauge exploded at the low pressure gauge as shown by Olin's pictures. An expert recreated the explosion in the court room and testified that in his opinion the explosion was caused by the combination of grease in the gauges or fittings and high pressure oxygen. Under this evidence it is certainly a jury question as to the proximate cause of the explosion.

The sound judicial practice of leaving determinations of negligence and proximate cause to the jury is well established in both the state and federal courts. In **Ney v. Yellow Cab Company, 2 Ill. 2d 74, 84, 117 N. E. 2d 74, 80,** the Court stated:

> "Questions of negligence, due care and proximate cause are ordinarily questions of fact for a jury to decide. The right of trial by jury is recognized in the Magna Charta or Declaration of Independence and both our state and federal constitutions. It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results

should never be determined as matters of law. The debatable qualities of issues such as negligence and proximate cause, the fact that fair minded men might reach different conclusions, emphasize the appropriateness and necessity of leaving such questions to a fact finding body. The jury is the tribunal under our legal system to decide that type of issue. To withdraw such questions from a jury is to usurp its functions." (Bailey v. Central Vermont Railway Co., 319 U. S. 350.)

B

In the same manner the United States Court of Appeals of the Seventh Circuit erred in holding that plaintiffs were contributorily negligent as a matter of law.

The holding of the Court of Appeals is based on the unwarranted inference that plaintiffs Craig and Parnell were aware of the possible danger of an explosion if grease or oil came into contact with oxygen under pressure. This inference is wholly unsubstantiated in the evidence. While both were experienced ironworkers and familiar with the use of cutting torches and the practice of insuring that fittings were free from grease and oil, and while both were aware of possible fires from the direct use of the torches on grease or oil covered surfaces, there is no evidence that they were aware of the danger of an explosion if grease or oil came into contact with oxygen under pressure.

Assuming the Court were correct in inferring that plaintiffs knew the possible danger such an inference would still not permit the holding that plaintiffs were contributorily negligent as a matter of law under the applicable Illinois decisions. The holding of the Court of Appeals on this issue is, in effect, that the plaintiffs had assumed the risk of the explosion. Assumption of the risk has been consistently held to be inapplicable in cases based on neg-

ligence and is restricted in Illinois to cases of master-servant relationships (see generally Hensley v. Hensley, 62 Ill. App. 2d 252; 210 N. E. 2d 658), and more recently has been extended to cases of strict tort liability. Williams v. Brown Manufacturing Co. (Illinois Supreme Court Docket No. 41425, Mar. 1970). The distinction between assumption of the risk and contributory negligence was pointed out by the United States Supreme Court in Seaboard Airline Railway Co. v. Horton, 233 U. S. 492 at 503-504:

> "Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, in sense it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault a negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part."

This distinction is well recognized in the law of Illinois. In Svensen v. City of Rockford, 9 Ill. 2d 122, 136 N. E. 2d 777, which involved an injury resulting from a defect in a sidewalk, but which, nevertheless, based on general principles of negligence, the Illinois Supreme Court held that the plaintiff's knowledge of a danger does not per se preclude him from recovery but such knowledge is a circumstance, perhaps a strong one, but it should be submitted with the other facts of the case to a jury for them to determine whether with such knowledge the plaintiff exercise ordinary care in proceeding in a way known to be dangerous or in proceeding used ordinary care to avoid injury.

Finally, it is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the probability of harm and gravity of threatened injury against the value of the interest which must be sacrificed to avoid it or the burden of adequate precautions. United States v. Carroll Towing Co., 159 F. 2d 162 (2d Cir. 1947); Prosser, the Law of Torts, 152 (3rd ed. 1964); 2 Harper & James, The Law of Torts, Sec. 16.9 (1956). The absence of quantitative measures in this balancing process generally precludes reduction of negligence to fixed rules. As a result the jury is particularly appropriate to evaluate an actor's conduct based on commonly accepted community standards.

In its opinion, the Court of Appeals determined that, as a matter of law, the probability of an explosion and seriousness of the injuries outweighed the plaintiffs' interests in their jobs; and that court would require, again as a matter of law, that a man refuse to work under the circumstances of this case, or be precluded from recovering for any injury which could result. We do not believe that any court should be permitted to hold that, under the circumstances of this case, a man is guilty of contributory negligence as a matter of law if he fails or refuses to abandon the work to which he has been assigned and on which he depends for his livelihood. Only a jury familiar with community standards should make such a judgment.

Both Craig and Parnell testified that it was important to keep the connections free from dirt and grease because the torch might malfunction; both testified that they looked at the connections and they appeared clean when they made the connection; both were performing their job in the area made available by Olin. Whether Craig and Parnell were aware of the danger or whether they were in the exercise of ordinary care for their own safety is a question for the jury to determine under the evidence.

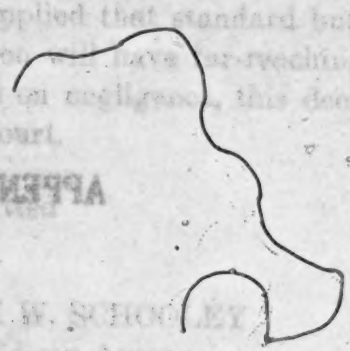
CONCLUSION

In conclusion we believe that because the Court of Appeals has failed to apply the standard for direction of verdicts as established by the Illinois Supreme Court as required by the decision of Erie v. Tompkins, or, that because the Court of Appeals applied that standard but did so improperly that this decision will have far-reaching effects upon future cases based on negligence, this decision should be reviewed by this Court.

Respectfully submitted

WILLIAM W. SCHOOLEY
2038 Edison Avenue
Granite City, Illinois 62040
Attorney for Petitioners

APPENDIX.



In the
United States Court of Appeals
for the Seventh Circuit

September Term, 1969, April Session, 1970

No. 17649
Eula Craig and Elliott Craig,
Plaintiffs-Appellants,

v.

Olin Mathieson Chemical Corporation, Defendant-Appellee.

No. 17650
Olin Mathieson Chemical Corporation, Defendant-Appellant,

v.

Eula Craig and Elliott Craig,
Plaintiffs-Appellees.

No. 17651
Eichleay-Wolfe Companies, Joint Venturers, Third Party Defendant-Appellant,

v.

Olin Mathieson Chemical Corporation, Third Party Plaintiff-Appellee.

No. 17652
Olin Mathieson Chemical Corporation, Defendant-Appellant,

v.

Woodrow Parnell,
Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

June 24, 1970

Before Swygert, Chief Judge, and Major and Hastings, Senior Circuit Judges.

Major, Senior Circuit Judge. In the early 1960's, defendant, Olin Mathieson Chemical Corporation (Olin), began a program which consisted of building a new casting plant and renovating the existing plant facilities at East Alton, Madison County, Illinois. In connection with this program Olin, on June 14, 1963, entered into a contract with the third party defendant, Eichleay-Wolfe (contractor), to perform certain remodeling of the existing Olin tandem mill by removal of the conveyors. In doing so the contractor utilized oxygen-acetylene torches operated by members of the ironworkers' trade. Work was commenced under the terms of the contract on September 7, 1963. On that date two of the contractors' employees, Elliott Craig and Woodrow Parnell, received serious injuries as the result of the explosion of an instrumentality which they were using.

Craig and Parnell instituted a suit against Olin, alleging that the injuries sustained were the result of negligence on the part of Olin. Eula Craig, wife of Elliott, joined in this action against Olin, claiming damages for loss of services as a result of the injuries sustained by her husband. Olin by answer denied negligence on its part and alleged that the injuries sustained by Craig and Parnell were the result of their own negligence and that they were guilty of contributory negligence as a matter of law, which constituted a bar to their action against Olin.

In the meantime, Olin brought a third party indemnity action against the contractor, based upon both the terms of the contract and the common law.

The cases were consolidated and tried before a jury. The jury returned verdicts against Olin in favor of Elliott Craig in the sum of $12,000; in favor of Woodrow Parnell in the sum of $1,500, and in favor of Eula Craig in the sum of no dollars and no cents. From the judgment entered on these verdicts the Craigs appeal on the ground that they were so inadequate as to be clearly erroneous, and seek a remand for a retrial on the issue of damages only. From the judgment in favor of Parnell, Olin appeals.

In the action by Olin against the contractor for indemnity the parties agreed that the issue of contractual indemnity should be submitted to the trial court for determination, which was decided adversely to the contractor. The common law issue of indemnity was submitted to a jury, which returned a verdict in favor of Olin and against the contractor. The court entered judgment for indemnity in favor of Olin and against the contractor. From this judgment the contractor appeals.

In this connection it is pertinent to note that Olin in the action against it for damages moved for a directed verdict at the conclusion of plaintiffs' testimony and again at the conclusion of all of the testimony. Ruling on such motions was reserved by the court. After verdict, such motions were denied, as well as Olin's motion for a judgment notwithstanding the verdict. Like motions were made by the contractor in the indemnity action against it, with similar rulings by the court.

We shall first consider the appeal by plaintiffs in their action against Olin. On this phase of the case we have reached the conclusion that there was no adequate proof of negligence on the part of Olin and, in any event, the employees Craig and Parnell were chargeable with contributory negligence which as a matter of law was a bar to their action. Therefore, we hold that the court erred in its denial of Olin's motion for a directed verdict and

in its denial of Olin's motion for a judgment notwithstanding the verdict.

With the conclusion thus reached, plaintiffs' contention that the amounts awarded by the jury were so inadequate as to be clearly erroneous becomes irrelevant.

The conclusion also calls for a rather detailed statement of facts. Recognizing our function to view the evidence in the light most favorable to plaintiffs, we take our statement mainly from their brief. Before doing so, however, we think it is relevant to set forth pertinent provisions of the contract entered into between Olin and the contractor, the employer of Craig and Parnell. It provides:

> "(2) The Contractor shall furnish all labor, Materials, Construction Items, all services, equipment, and shall perform all of the Work required for the construction and completion of the Project * *.
>
> * * *
>
> "(5) The execution, direction, management and performance of the entire Work under the Contract, and the completion of the Project in accordance with all the terms and conditions of the contract, shall be carried out and performed under the direction and personal supervision of a Resident Project Manager, who shall be Mr. Glenn A. Wolfe, and who shall have absolute and full power of management and direction in all matters relating to such work, and with full power to Act for M. H. Wolfe and Company and Eichleay Corporation, the Joint Adventurers (the Contractor hereunder), to do all things necessary or required to be done or performed by the Contractor, under the terms and conditions of the Contract, including without limitation * *.
>
> * * *

"• • In addition thereto, contractor represents that it has special qualifications for doing the work and completing the project and will complete the work and project to the satisfaction of owner in full conformity with the highest current standards of the respective trades.

• • •

"16.2. Contractor shall take all necessary precautions against the possibility of fire and any other hazard to persons or property, and shall comply with all applicable provisions of Federal, State and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the Jobsite. Contractor shall erect and properly maintain at all times, as required by the conditions and progress of the Work, all necessary safeguards for the protection of workmen and the public • • and Contractor shall designate a responsible member of its organization on the work whose duty shall be the prevention of accidents. The name and position of any person so designated shall be reported to the Engineer and Owner by Contractor."

Olin prior to the execution of the contract utilized the tandem mill to roll and squeeze cast bars of hot brass between ringers to make them into long thin sheets. In this operation it used large amounts of grease and oil to lubricate the conveyors and ringers and to cool the brass. The grease and oil dripped to the floor or into pans, and over the years the machinery became coated with oil. The contract called for removal of these conveyors. The contractor started work to remove them on September 7, 1963, the day plaintiffs were injured. Under the contract, Olin allowed the contractor twenty-nine days to complete the job, working twenty-four hours per day, under a work schedule called a "critical path schedule."

Prior to entering the contract, Glenn Wolfe, owner of the M. H. Wolfe Construction Company and project engineer for the joint venture, inspected the conveyor area with Lino Marcon, project manager for Olin, and noted the grease and oil on the conveyors. To remove the conveyors the contractor utilized oxygen-acetylene torches operated by members of the ironworkers' trade.

Craig was a thirty-five-year old construction ironworker. Among his duties were erecting structural steel, installing reinforcing steel in concrete, welding and burning metal, and moving machinery. He had been using oxygen and acetylene welding equipment for welding and burning since he started as an ironworker in 1949. He had been instructed in the use of oxygen-acetylene torches while serving a two-year apprenticeship. Parnell was also an experienced ironworker. Both were aware of the importance of keeping the connections of the torch free from dirt and oil. Craig had been working for the contractor approximately twelve months prior to the date of the accident. Some two weeks prior to the time of the accident, Craig knew he was going to work removing the conveyors. He made an inspection of the area with Marcon, construction superintendent. He stated that he asked that the dirt and grease be cleaned from the area, which statement was denied by Marcon.

On September 7, 1963, Craig and Parnell were assigned to burn out anchor bolts and conveyors. This process was accomplished by means of an oxygen and an acetylene tank mounted on a two-wheel dolly cart. On top of each tank was a gauge with both high and low pressure valves. After working for an hour or so, plaintiffs' clothes and gloves became saturated with oil and grease.

Craig and Parnell started to work at 8 a. m. September 7, 1963, and went to dinner at 5 p. m. During the day there was no difficulty with the tanks or gauges. Shortly

after dinner, they ran out of oxygen. The gauges were taken off the oxygen tank by Craig and placed on a cart. They went to a storage area approximately fifty feet away, deposited the old tank and picked up a new one. Upon returning to their work they rehooked the gauges and hoses to the tank. Craig looked but did not see any grease on the fittings before they were rehooked. Parnell then opened the high pressure valve to let air to the gauge, which instantaneously exploded, causing the injuries complained of. Craig admitted that he did not receive any directions from Olin personnel.

Plaintiffs introduced the testimony of an expert witness who conducted experiments in the presence of the court and jury and, in response to a hypothetical question, gave it as his opinion that the opening of the high pressure oxygen valve would cause high pressure oxygen to come into contact with a combustible material such as oil or grease in the area between the tank and the low pressure valve, resulting in a fire and explosion similar to the one described by Craig.

Marcon, construction superintendent for Olin but called as a witness by plaintiffs, testified that the area in which the contractor was to work was marked off and turned over to the contractor. He was permitted to make inspections of the area but not to give instructions to employees on the job. He had authority to give orders to Wolfe in a limited way so as to keep the work on schedule and to see that it was properly done.

Plaintiffs introduced certain safety regulations subscribed to by Olin, which suggested that employees refrain from handling oxygen cylinders or apparatus with oily hands or gloves.

In summary, the area involved, owned by Olin, was turned over to the contractor who by the terms of the contract had "absolute and full power of management

and direction in all matters relating to such work." All equipment, including the oxygen-acetylene torches used by plaintiffs, was owned and furnished by the contractor. Olin removed its employees from the restricted area and had no control over or the right to direct the manner and means by which plaintiffs as employees of the contractor performed their work. All of the parties—Olin, the contractor and the employees—were aware of the condition as to the oil and grease at the time the area was turned over to the contractor. It is not discernible how a finding of negligence on the part of Olin can be sustained. If there was any negligence which was the proximate cause of plaintiffs' injuries, it was the manner in which they used the equipment furnished by the contractor.

Excerpts from the testimony of Elliott Craig are pertinent:

"Q. Mr. Craig, you have been in the trade as an ironworker since 1949, is that right, sir?

A. Yes.

Q. And at what age were you when you went into the trade?

A. Twenty-one, I believe.

Q. Twenty-one. All right now, did you go to an apprentice school?

A. I worked, I wasn't going to an apprentice school, but I worked two years before I received a journeyman's book, yes.

Q. Did you work for another ironworker, or that is, did you work under other ironworkers, is that right?

A. Yes.

Q. And these fellows would instruct you on the application of your trade, is that right, sir?

A. Yes.

Q. Did they instruct you with respect to the use of a torch?

A. Yes.

Q. Is the torch a usual and normal instrument or tool to be used by ironworkers?

A. Yes.

Q. Virtually every job you go on that you do any ironworking you use a torch, do you not?

A. Right.

* * *

Q. When you went on the job, under whose direction were you?

A. Milton Strong.

Q. And who did Milton Strong work for?

A. Eichleay-Wolfe.

Q. Was he the general foreman over your trade?

A. Yes, sir.

Q. Well, did you see Glenn Wolfe, was he out there on the job?

A. Yes, sir.

Q. And your immediate supervisor, I take it, was Milton Strong who was the ironworkers' general foreman, is that right?

A. Yes, sir.

Q. And did most of your directions come from him?

A. All of them.

Q. All of them. Wasn't anybody else who had any right or had any business directing you except Mr. Milton Strong, is that right?

A. Right.

* * *

Q. All right. Now when you hooked originally that morning, when you hooked these gauges onto these tanks, didn't you check or did you check to see if these connections were free of dirt and grease and so forth?

A. We always do.

Q. That's a normal, standard procedure, is it not?

A. Right.

* * *

Q. All right. Now then, when you hooked these hoses on, I take it that we've got the gauges hooked to the tanks now, and when you hooked these hoses on, did you check these connections to see they were free of dirt and grease and so forth?

A. Yes, sir, best I could, see they were free, because that was what I was always informed to check them and see that they are clear.

Q. Right. And that's what every ironworker is instructed even in apprentice school, is he not?

A. Yes.

Q. Be sure these connections are free of dirt and grease and so forth, isn't that correct, sir?

A. Yes.

* * *

Q. Now tell me this, no one from Olin Mathieson Chemical Corporation was directing you in the operation of this work, were they?

A. No."

Plaintiffs' case rests on the premise that Olin was remiss in its duty to furnish the employees of the contractor with a safe place to work. Many Illinois cases are cited which generally embrace the principle announced in *Calvert v. The Springfield Electric Light and Power Co.*, 231 Ill. 290. Plaintiffs on brief quote from this case (page 293):

> "The law is well settled that an owner or occupant of land who by invitation, express or implied, induces or leads others to go upon premises for any unlawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches, if such

> condition was known to him *and not to them*, and was negligently suffered to exist without timely notice to the public or to those who are likely to act upon such invitation, *and if there are hidden dangers upon the premises* he must use ordinary care to give persons rightfully upon the premises warning thereof, and that the owner owes such duty to an independent contractor or his servants while working upon his premises. [Italics ours.]"

The principle thus announced is of no benefit to plaintiffs inasmuch as the presence of oil and grease, of which they complain, was as well known to them and their employer as it was to Olin. It was not a hidden danger, it was obvious to all.

In *National Builders Bank of Chicago v. Schuham*, 319 Ill. App. 546, the court held that the owner of property owes to an independent contractor and his servants who work thereon the duty of exercising reasonable care to have the premises in a safe condition for the work, unless the defects responsible for the injury are known to the contractor.

In the late case of *Ragni v. Lincoln-Devon Bounceland, Inc.*, 91 Ill. App. 2d 172, 234 N. E. 2d 168, 169, the Calvert rule was applied where a directed verdict for the defendant was affirmed in a suit arising from a trampoline accident. The court found that plaintiff, by the exercise of care of an ordinarily intelligent person, should have been aware of the obvious dangers involved in jumping upon a mat.

In *Brunet v. S. S. Kresge Co.*, 115 F. 2d 713, 715, this court quoted from the Calvert rule and denied recovery to a plaintiff who sued because of a fall on slippery steps. We noted that there was nothing hidden in the slippery and wet condition of the stairway and that the plaintiff,

being apprised of the condition, should be held to as high a degree of care for her own safety as was the owner of the premises.

A case of some relevancy because of its similarity of facts is *Deaton v. Board of Trustees of Elon College,* 226 N. C. 433, 38 S. E. 2d 561. In that case the college employed an independent contractor to make repairs of its electrical system. The defendant was held as a matter of law not liable for the death of one of the employees who while standing on wet ground touched a live wire and was electrocuted. The independent contractor knew at the time of making the contract that some of the wires were high tension. The court concluded that the owner was not liable for injuries resulting from conditions obviously dangerous and known by the contractor to be so. Further, the court reasoned that the contractor was an expert, exercising his specialized knowledge according to his own judgment and with his own devices, and that he was aware of the danger inherent in the condition, as well as the peril incident to handling live wires while standing on wet ground.

Plaintiffs on brief attempt to escape the Illinois rule with the statement:

> "The defective conditions upon which the Illinois Courts have ruled concern an isolated danger which can be avoided if the employee has the knowledge of the danger. Craig and Parnell encountered a condition in which there was no way to escape the oil and grease in the performance of their duties. It is similar to throwing a person in a swimming pool and telling them not to get wet."

It seems implicit in this argument that Craig and Parnell were under some sort of compulsion to work even though they had knowledge of the dangerous condition. Of course, that is not the case. The swimming pool illustration is

inept. A better one would be, a person who couldn't swim, and with knowledge of the danger, jumping into a swimming pool and drowning.

Plaintiffs on brief come close to admitting that they were contributorily negligent. They state:

> "Although Olin contends and we concede that both Craig and Parnell were aware of the importance of keeping the connections in the torch free from grease and dirt, neither knew of the danger of an explosion."

It is a novel theory, we think it is not the law, that a person can escape responsibility for his negligence on the ground that he did not know what the consequences would be.

Plaintiffs also rely upon Restatement of Torts 2d, Section 413, which relates to the duty to provide for the taking of precautions against dangers involved in work entrusted to a contractor, and cite cases from other jurisdictions which have applied this section and which purportedly announce a rule different from that followed by the Illinois courts. Plaintiffs on brief state:

> "A search of Illinois cases has failed to reveal any court in Illinois which has applied Section 413 of the Restatement of Torts 2d to employees of the independent contractor."

We see no reason to pursue the argument in this respect as we are obligated to follow the law as announced by the Illinois courts.

While the question is not free from doubt, we think the proof was insufficient to establish the charge of negligence against Olin. In any event, the proof is clear that plaintiffs were not in the exercise of due care and caution for their own safety and, therefore, were guilty of contributory negligence as a matter of law.

We conclude and so hold that the court erred in its denial of Olin's motion for a directed verdict and its motion for a judgment notwithstanding the verdict.

This brings us to the appeal by the contractor from the judgment in favor of Olin in its action for indemnity. As already noted, Olin sought recovery on two grounds, (1) the common law, and (2) the provision of the contract between Olin and the contractor. The common law issue was submitted to the jury, which returned a verdict in favor of Olin. The contractual issue was by agreement of the parties submitted to the court and determined in favor of Olin. We think Olin is entitled to prevail if either theory is supportable. In fact, the court appears to have rendered judgment only on the contractual provision. Its judgment order recites:

> "* * * and the Court further allows the Motion of the Third Party Plaintiff, OLIN MATHIESON CHEMICAL CORPORATION for judgment in its favor and against the Third Party Defendant, EICHLEAY-WOLFE COMPANIES on the written contract of indemnity including damages, attorney's fees and expenses * * *."

By the judgment Olin was awarded the sum of $13,500 as damages, the amount awarded to Craig and Parnell, $12,000 to the former and $1,500 to the latter, and $5,283.23, for attorney fees and expenses up to the date of the judgment, March 4, 1969.

The contractor on brief states the issue for review, insofar as it pertains to its contractual liability, as follows:

> "Whether the indemnity agreement between third party plaintiff and third party defendant indemnified third party plaintiff against its own negligence proximately causing plaintiffs' injuries."

We think this issue has become moot in view of our decision exonerating Olin (third party plaintiff) of negligence proximately causing plaintiffs' injuries and reversing the judgments against Olin. Obviously, Olin is not entitled to recover damages in the amount of $13,500, awarded to Craig and Parnell, and the judgment will be modified in that respect. Olin is entitled to recover $5,825.23, the amount of attorney fees and expenses included in the judgment, without prejudice to the right of the court to allow such further attorney fees and expenses as the court may determine to be reasonable.

The case of Eula Craig, Elliott Craig and Woodrow Parnell against Olin Mathieson Chemical Corporation is reversed and the cause remanded, with directions to enter a judgment in favor of Olin. The case of Olin Mathieson Chemical Corporation against Eichleay-Wolfe Companies is remanded, with directions to modify the judgment in accordance with this opinion.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit